United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1491

To be argued by
PETER R. CASEY, III

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1491

UNITED STATES OF AMERICA,

Appellee,

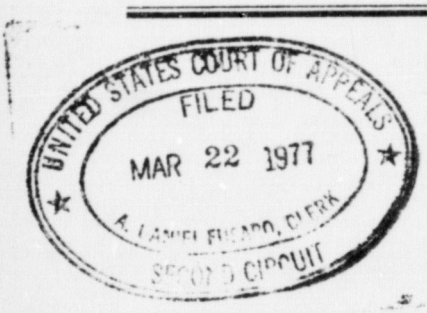
—v.—

FRANK AMENDOLA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE



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OTHER REFERENCES

STATUTES AND RULES

Citation of Statutes

TITLE 18, UNITED STATES CODE

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling busi-

ness and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizures, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefits of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub. L. 91-452, Title VIII, § 803(c), Oct. 15, 1970, 84 Stat. 937.

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending whichever date last occurs. Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from arraignment on the information or indictment at such place, within the district, as fixed by the appropriate judicial officer.

(d) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in

a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from an examination of the defendant, and hearing on, his mental competency, or physical incapacity;

(B) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from trials with respect to other charges against the defendant;

(D) delay resulting from interlocutory appeals;

(E) delay resulting from hearings on pretrial motions;

(F) delay resulting from proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure; and

(G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was

dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or other-

wise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.

(iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by event beyond the control of the court or the Government.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner

of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

Added Pub.L. 93—619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2076.

§ 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of his chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by

section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25

per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

Added Pub.L. 93—619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2079.

§ 3163. Effective dates

(a) The time limitation in section 3161(b) of this chapter—

(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in con-

nection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.

(b) The time limitation in section 3161(c) of this chapter—

(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

(c) Section 3162 of this chapter shall become effective after the date of expiration of the fourth twelve-calendar-month period following July 1, 1975.

Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2080.

§ 3164. Interim limits

(a) During an interim period commencing ninety days following July 1, 1975 and ending on the date immediately preceding the date on which the time limits provided for under section 3161(b) and section 3161(c) of this chapter become effective, each district shall place into operation an interim plan to assure priority in the trial or other disposition of cases involving—

(1) detained persons who are being held in detention solely because they are awaiting trial, and

(2) released persons who are awaiting trial and have been designated by the attorney for the Government as being of high risk.

(b) During the period such plan is in effect, the trial of any person who falls within subsection (a)(1) or (a)(2) of this section shall commence no later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The trial of any person so detained or designated as being of high risk on or before the first day of the interim period shall commence no later than ninety days following the first day of the interim period.

(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required.

Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2081.

§ 3165. District plans—generally

(a) Each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrates of the district and shall prepare plans for the disposition of criminal cases in accordance with this chapter. Each such plan shall be formulated after consultation with, and after considering the recommendations of, the Federal

Judicial Center and the planning group established for that district pursuant to section 3168. The plans shall be prepared in accordance with the schedule set forth in subsection (e) of this section.

(b) The planning and implementation process shall seek to accelerate the disposition of criminal cases in the district consistent with the time standards of this chapter and the objectives of effective law enforcement, fairness to accused persons, efficient judicial administration, and increased knowledge concerning the proper functioning of the criminal law. The process shall seek to avoid underenforcement, overenforcement and discriminatory enforcement of the law, prejudice to the prompt disposition of civil litigation, and undue pressure as well as undue delay in the trial of criminal cases.

(c) The plans prepared by each district court shall be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being reviewed or such other active judge of that court as the chief judge of that district court may designate. If approved by the reviewing panel, the plan shall be forwarded to the Administrative Office of the United States Courts, which office shall report annually on the operation of such plans to the Judicial Conference of the United States.

(d) The district court may modify the plan at any time with the approval of the reviewing panel. It shall modify the plan when directed to do so by the reviewing panel or the Judicial Conference of the United States. Modifications shall be reported to the Administrative Office of the United States Courts.

(e) (1) Prior to the expiration of the twelve-calendar-month period following July 1, 1975, each United States

district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the second and third twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c).

(2) Prior to the expiration of the thirty-six calendar month period following July 1, 1975, each United States district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the fourth and subsequent twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c).

(f) Plans adopted pursuant to this section shall, upon adoption, and recommendations of the district planning group shall, upon completion, become public documents.

Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2081.

§ 3166. District plans—contents

(a) Each plan shall include a description of the time limits, precedural techniques, innovations, systems and other methods, including the development of reliable methods for gathering and monitoring information and statistics, by which the district court, the United States attorney, the Federal public defender, if any, and private attorneys experienced in the defense of criminal cases, have expedited or intend to expedite the trial or other disposition of criminal cases, consistent with the time limits and other objectives of this chapter.

(b) Each plan shall include information concerning the implementation of the time limits and other objectives of this chapter, including:

(1) the incidence of and reasons for, requests or allowances of extensions of time beyond statutory or district standards;

(2) the incidence of, and reasons for, periods of delay under section 3161(h) of this title;

(3) the incidence of, and reasons for, the invocation of sanctions for noncompliance with time standards, or the failure to invoke such sanctions, and the nature of the sanction, if any, invoked for noncompliance;

(4) the new timetable set, or requested to be set, for an extension;

(5) the effect on criminal justice administration of the prevailing time limits and sanctions, including the effects on the prosecution, the defense, the courts, the correctional process, costs, transfers and appeals;

(6) the incidence and length of, reasons for, and remedies for detention prior to trial, and information required by the provisions of the Federal Rules of Criminal Procedure relating to the supervision of detention pending trial;

(7) the identity of cases which, because of their special characteristics, deserve separate or different time limits as a matter of statutory classifications; and

(8) the incidence of, and reasons for each thirty-day extention[1] under section 3161(b) with respect to an indictment in that district.

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[1] So in original. Probably should be "extension".

(c) Each district plan required by section 3165 shall include information and statstics concerning the administration of criminal justice within the district, including, but not limited to:

(1) the time span between arrest and indictment, indictment and trial, and conviction and sentencing;

(2) the number of matters presented to the United States Attorney for prosecution, and the numbers of such matters prosecuted and not prosecuted;

(3) the number of matters transferred to other districts or to States for prosecution;

(4) the number of cases disposed of by trial and by plea;

(5) the rates of nolle prosequi, dismissal, acquittal, conviction, diversion, or other disposition; and

(6) the extent of preadjudication detention and release, by numbers of defendants and days in custody or at liberty prior to disposition.

(d) Each plan shall further specify the rule changes, statutory amendments, and appropriations needed to effectuate further improvements in the administration of justice in the district which cannot be accomplished without such amendments or funds.

(e) Each plan shall include recommendations to the Administrative Office of the United States Courts for reporting forms, procedures, and time requirements. The Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, shall prescribe such forms and proce-

dures and time requirements consistent with section 3170 after consideration of the recommendations contained in the district plan and the need to reflect both unique local conditions and uniform national reporting standards.

Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2082.

§ 3167. Reports to Congress

(a) The Administrative Office of the United States Courts, with the approval of the Judicial Conference, shall submit periodic reports to Congress detailing the plans submitted pursuant to section 3165. The reports shall be submitted within three months following the final dates for the submission of plans under section 3165(e) of this title.

(b) Such reports shall include recommendations for legislative changes or additional appropriations to achieve the time limits and objectives of this chapter. The report shall also contain pertinent information such as the state of the criminal docket at the time of the adoption of the plan; the extent of pretrial detention and release; and a description of the time limits, procedural techniques, innovations, systems, and other methods by which the trial or other disposition of criminal cases have been expedited or may be expedited in the districts.

Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2083.

§ 3168. Planning process

(a) Within sixty days after July 1, 1975, each United States district court shall convene a planning group consisting at minimum of the Chief Judge, a United States magistrate, if any, designated by the Chief Judge, the United States Attorney, the Clerk of the district court,

the Federal Public Defender, if any, a private attorney experienced in the defense of criminal cases in the district, the Chief United States Probation Officer for the district, and a person skilled in criminal justice research who shall act as reporter for the group. The group shall advise the district court with respect to the formulation of all district plans and shall submit its recommendations to the district court for each of the district plans required by section 3165. The group shall be responsible for the initial formulation of all district plans and of the reports required by this chapter and in aid thereof, it shall be entitled to the planning funds specified in section 3171.

(b) The planning group shall address itself to the need for reforms in the criminal justice system, including but not limited to changes in the grand jury system, the finality of criminal judgments, habeas corpus and collateral attacks, pretrial diversion, pretrial detention, excessive reach of Federal criminal law, simplification and improvement of pretrial and sentencing procedures, and appellate delay.

(c) Members of the planning group with the exception of the reporter shall receive no additional compensation for their services, but shall be reimbursed for travel, subsistence and other necessary expenses incurred by them in carrying out the duties of the advisory group in accordance with the provisions of title 5, United States Code, chapter 57. The reporter shall be compensated in accordance with section 3109 of title 5, United States Code, and notwithstanding other provisions of law he may be employed for any period of time during which his services are needed.

Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2083.

§ 3169. Federal Judicial Center

The Federal Judicial Center shall advise and consult with the planning groups and the district courts in connection with their duties under this chapter.

Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2084.

§ 3170. Speedy trial data

(a) To facilitate the planning process and the implementation of the time limits and objectives of this chapter, the clerk of each district court shall assemble the information and compile the statistics required by sections 3166(b) and (c) of this title. The clerk of each district court shall assemble such information and compile such statistics on such forms and under such regulations as the Administrative Office of the United States Courts shall prescribe with the approval of the Judicial Conference and after consultation with the Attorney General.

(b) The clerk of each district court is authorized to obtain the information required by sections 3166(b) and (c) from all relevant sources including the United States Attorney, Federal Public Defender, private defense counsel appearing in criminal cases in the district, United States district court judges, and the chief Federal Probation Officer for the district. This subsection shall not be construed to require the release of any confidential or privileged information.

(c) The information and statistics compiled by the clerk pursuant to this section shall be made available to the district court, the planning group, the circuit council, and the administrative Office of the United States Courts.

Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2084.

§ 3171. Planning appropriations

(a) There is authorized to be appropriated for the fiscal year ending June 30, 1975, to the Federal judiciary the sum of $2,500,000 to be allocated by the Administrative Office of the United States Courts to Federal judicial districts to carry out the initial phases of planning and implementation of speedy trial plans under this chapter. The funds so appropriated shall remain available until expended.

(b) No funds appropriated under this section may be expended in any district except by two-thirds vote of the planning group. Funds to the extent available may be expended for personnel, facilities, and any other purpose permitted by law.

Added Pub.L. 93-619, Title I. § 101, Jan. 3, 1975, 88 Stat. 2084.

§ 3172. Definitions

As used in this chapter—

(1) the terms "judge" or "judicial officer" mean, unless otherwise indicated, any United States magistrate, Federal district judge, and

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a petty offense as defined in section 1(3) of this title, or an offense triable by court-martial, military commission, provost court, or other military tribunal).

Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2085.

§ 3173. Sixth amendment rights

No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution.

Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2085.

§ 3174. Judicial emergency

(a) In the event that any district court is unable to comply with the time limits set forth in section 3161(c) due to the status of its court calendars, the chief judge, where the existing resources are being efficiently utilized, may, after seeking the recommendations of the planning group, apply to the judicial council of the circuit for a suspension of such time limits. The judicial council of the circuit shall evaluate the capabilities of the district, the availability of visiting judges from within and without the circuit, and make any recommendations it deems appropriate to alleviate calendar congestion resulting from the lack of resources.

(b) If the judicial council of the circuit shall find that no remedy for such congestion is reasonably available, such council may apply to the Judicial Conference, of the United States for a suspension of time limits set forth in section 3161(c). The Judicial Conference if it finds that such calendar congestion cannot be reasonably alleviated, may grant a suspension of the time limits in section 3161(c) for a period of time not to exceed one year for the trial of cases for which indictments are filed during such period. During such period of suspension, the time limits from arrest to indictment, set forth in section 3161(b), shall not be reduced, nor shall the sanctions set forth in section 3162 be suspended; but such time limits from arrangement to trial shall not be increased to exceed one hundred and eighty days. The time limits for the trial of cases of detained persons who

are being detained solely because they are awaiting trial shall not be affected by the provisions of this section.

(c) Any suspension of time limits granted by the Judicial Conference shall be reported to the Congress within ten days of approval by the Director of the Administrative Office of the United States Courts, together with a copy of the application for such suspension, a written report setting forth detailed reasons for granting such approval and a proposal for increasing the resources of such district. In the event an additional period of suspension of time limits is necessary, the Director of the Administrative Office of the United States Courts shall so indicate in his report to the Congress, which report shall contain such application for such additional period of suspension together with any other pertinent information. The Judicial Conference shall not grant a suspension to any district within six months following the expiration of a prior suspension without the consent of the Congress. Such consent may be requested by the Judicial Conference by reporting to the Congress the facts supporting the need for a suspension within such six-months period. Should the Congress fail to act on any application for a suspension of time limits within six months, the Judicial Conference may grant such a suspension for an additional period not to exceed one year.

Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2085.

Title 47, United States Code

§ 605. Unauthorized publication or use of communications

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or

assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any other information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to sips in distress.

As amended June 19, 1968, Pub.L. 90-351, Title III, § 803, 82 Stat. 223.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1491

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK . MENDOLA,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

A Grand Jury sitting at Hartford, Connecticut returned a True Bill on May 3, 1974, charging the appellant, Frank Amendola, and six other individuals with violating Sections 1955 and 371 of Title 18, United States Code. The appellant pled not guilty to the charges on June 10, 1974. All documents relevant to electronic surveillance were ordered unsealed on June 21, 1974. The government filed Notice of Readiness on July 1, 1974. Numerous motions were made on behalf of the appellant and his co-defendants, including Motions to Dismiss and Suppress, but were denied by the Honorable Robert C. Zampano, United States District Judge, on February 18, 1976.

On July 12, 1976, five of the defendants requested leave to change their pleas, which was granted by Judge

Zampano on the same date. The five defendants then pled guilty to Count One of the Indictment (18 U.S.C. § 1955). The Court subsequently granted the government's Motion for Dismissal of the Conspiracy Count against each of the five defendants.

On July 20, 1976, a jury of twelve and two alternates was empanelled in the trial of appellant and Daniel Valeriano. The government began presenting evidence on July 21, 1976 and rested on July 30, 1976, after seven trial days. The appellant presented no evidence, and Daniel Valeriano called only one witness. The defendants rested on July 30, 1976. Judge Zampano charged the jury on August 3, 1976, with the jury retiring for deliberation at mid-day. At 4:38 p.m., on the same date, the jury returned a verdict of guilty on both Counts against Daniel Valeriano. The jury then returned to their deliberations as to the appellant. At 5:50 p.m., Judge Zampano released them until the following day. After beginning deliberations at 9:30 a.m. on August 4, 1976, then jury indicated, at 10:45 a.m., that they were deadlocked. Judge Zampano then granted the appellants' motion for a mistrial, and the jury was excused.

The government filed Notice of Readiness on August 8, 1976. The government again indicated its readiness on September 14, 1976 when the case was declared the fourth ready case on the list. A jury was not selected on that occasion. On October 19, 1976, Judge Zampano declared the case ready. Defendant filed a Motion to Dismiss the Indictment for failure to retry the defendant within 60 days. On October 20, 1976 the motion was denied, and jury selection began and the case was declared on trial by the Court. Jury selection was completed on November 4, 1976 with a jury of twelve and

two alternates empanelled. The government began the presentation of its case on that date, rested on November 11, 1976, after four trial days and having called six witnesses. The appellant presented no evidence. The Court charged the jury on November 12, 1976, with the jury retiring for their deliberations at approximately 1:00 p.m. At 2:35 p.m. the jury returned a verdict of guilty on both counts against Frank Amendola.

On December 13, 1976, Judge Zampano sentenced the appellant to one year imprisonment on Count One, and one year imprisonment on Count Two, sentence suspended, and three years probation, with the sentence on Count Two running consecutive to that on Count One. This appeal followed.

Statement of Facts

Application was made by the United States, on January 15, 1973, to the Honorable Thomas F. Murphy, United States District Judge, District of Connecticut, for an Order authorizing the interception of wire communications from the telephone (624-8802) subscribed to by Daniel Valeriano, and a different phone subscribed to by another individual. Judge Murphy issued an Order authorizing the wiretapping of the two telephones, for a period of fifteen (15) days, for the purpose of determining the manner in which Daniel Valeriano, Charles Furman, Frank Gunn, Catherine Brown, an individual known only as "Alfie," and unknown others, conduct an alleged "policy" operation. Appendix, pp.1-5.

The wiretaps were initiated on January 16, 1973 (Tr. 61) and terminated on January 27, 1973 (Tr. 190). A pen register device (dial number recorder) was also utilized during the period of the wire interceptions. On May 22, 1973, Judge Murphy authorized the installation

of a pen register on the telephone subscribed to by Mrs. Marie Amendola (248-2088). Appendix, pp. 6-7. The Court based its finding of probable cause on an affidavit submitted by Special Agent Raymond Connelly. Appendix, pp. 8-15. The pen register was operational from May 24, 1973 to June 1, 1973, and a report of the results was submitted to Judge Murphy on June 16, 1973. Appendix, pp. 16-17.

On July 10, 1973 the Honorable M. Joseph Blumenfeld, United States District Judge, ordered that inventory be served on the four individuals fully identified in the wiretap Order (Valeriano, Jones, Gunn, and Furman), and another individual (Celentano), who had not been named in the wiretap order. Appendix, pp. 18-19. Inventory was not ordered for, or provided to, the appellant.

On March 8, 1974 the appellant gave a voice exemplar to Federal Agents (Tr. 166-167). The appellant, Daniel Valeriano, Charles Furman, Catherine Jones, Frank Kinsler, Clifford Adams, and Ellsworth Bell were indicted for violating Sections 1955 and 371 of Title 18, United States Code, on May 3, 1974.

At appellants second trial, from which this appeal is taken, the government introduced gambling records seized from the home of Daniel Valeriano (Tr. 76-81), and played tape recordings of conversations intercepted during the January wiretap. The voice exemplar given by the appellant was also played for the jury. Agent Connolly and Captain Vincent Raucci, of the Hamden, Connecticut Police Department, both identified Frank Amendola as being a participant in certain of the conversations. (Tr. 300-316; 356-358). The identifications were based on voice comparison and personal contact with the appellant. Special Agent William Holmes, the governments

gambling expert, testified that, in his opinion, Frank Amendola was a managing partner in a "numbers" business which employed approximately 25 persons. (Tr. 457-458). He connected records seized at Valeriano's residence on July 16, 1973, with conversations between appellant and Valeriano in January, 1973 (Tr. 461-464; 481-482). He further testified that the business had been in continuous operation for at least twenty-seven (27) weeks (Tr. 465), and that it had taken in $2,043 on July 14, 1973 (Tr. 466).

ARGUMENT

I.

The denial of a motion to dismiss an indictment for failure to retry a defendant within 60 days is a discretionary act and ought not be disturbed absent prejudice or other compelling factors.

On August 4, 1976 the jury in appellant's first trial declared itself unable to reach a verdict, and Judge Zampano accordingly declared a mistrial.[1] The United States filed Notice of Readiness to proceed to trial on August 6, 1976. At a calendar call on September 14, 1976, the government again indicated its readiness and the case was declared the fourth ready case. Judge Zampano declared he would begin jury selection for *United States* v. *Torello*, *United States* v. *O'Neill*,[2] and *United States* v. *Chapman*, but he declined to pick a jury for Amendola stating: "I think it would be too much to pick four

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[1] A co-defendant, Daniel Valeriano, was convicted of violating Sections 1955 and 371 of Title 18, United States Code.

[2] The *Torello* case had been awaiting trial since April 1, 1976, and *O'Neill* had been pending since December 2, 1975.

juries". Appendix pp. 21-22. When counsel for appellant indicated a desire to start a state proceeding, the Court indicated that Amendola would no be set down "for a couple of weeks". Appendix, *id.* No demand was made, on behalf of the appellant, for an immediate retrial. The case was subsequently declared ready on October 19, 1976, and trial commenced on October 20, 1976, seventy-seven days after the declaration of mistrial. On these facts the appellant claims his indictment should have been dismissed for failure to retry him within 60 days of the mistrial.[3] He relies for support on Title 18, United States Code, Section 3161(e) (Speedy Trial Act of 1975), and the District of Connecticut Revised Rule 50(b) Plan, effective July 1, 1976 (hereinafter referred to as the Plan) (Appendix, pp. 61-80). He also raises two subsidiary issues, concerning double jeopardy and the testimony of a government expert, which will be dealt with in turn.

Section 3161 of Title 18, United States Code requires, in sum, that an indictment or information must be filed within 30 days of an arrest or summons [3161(b)], that trial commence within 60 days of arraignment [3161(c)], and that retrial commence within 60 days of a declaration of mistrial [3161(e)]. Sections 3162(a)(1) and (a)(2) mandate dismissal, with or without prejudice, for violations of the time requirements set forth in 3161(b) and (c). The sanctions, however, do not become effective until July 1, 1979. 18 U.S.C. §3163(c). The statute is silent as to any sanction for failure to retry a defendant within 60 days.

The District Plan, however, is more specific on the issue of retrial. While the Plan calls for retrial within

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[3] The 60 day period expired on October 3, 1976.

60 days [Section 5(e)], the Plan also contains the following language regarding sanctions:

> "Except as required by paragraphs (a), (b), and (c) of this section, failure to comply with the time limits prescribed in this Plan shall not require dismissal of the prosecution. The Court retains the power to dismiss a case for unnecessary delay pursuant to Rule 48(b) of the Federal Rules of Criminal Procedure." Pl[illegible], Section 10(d).[4]

The language of Rule 48(b) is, of course, discretionary:

> ". . . if there is unnecessary delay in bringing a defendant to trial, the court *may* dismiss the indictment . . ." Rule 48(b), F.R.Cr.P. (emphasis added).

It must be noted that the appellant makes no claim that he has suffered prejudice from the seventeen day delay. Nor does he claim that the delay was caused by any "deliberate prosecutorial effort to postpone the trial". *United States* v. *Drummond*, 511 F.2d 1049, 1054 (2d Cir.), *cert. denied*, 423 U.S. 844 (1975). Instead he relies on a rigid, overly technical reading of a rule which does not require the invocation of the sanction he requests.

What is a Court to do, however, when faced with a crowded docket which, along with the retrial, includes cases in which the defendants have been awaiting *any* trial for months? Certainly a weighing process must occur. We respectfully suggest that in the situation presented here, where the anticipated delay is minimal at worst, the defendant is free, and, having produced no

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[4] Subsection (a) concerns defendants in custody; subsection (b) concerns government readiness for trial within 60 days; and subsection (c) concerns juvenile defendants.

evidence at the first trial, the Court can anticipate that the defendant will suffer no loss of evidence, Judge Zampano took the correct course in extending the trial date for this case slightly beyond 60 days. Moreover, in speaking of an earlier Speedy Trial Plan for the Southern District of New York, this Court stated:

> "[T]he Plan was not established primarily to safeguard defendant's rights . . . [but instead] to serve the *public interest* in the prompt adjudication of criminal cases." *United States* v. *Flores*, 501 F.2d 1356, 1360 n.4 (2d Cir. 1974) (emphasis added).

In another case, also under an earlier Plan, an administrative mix-up had caused a delay and this Court stated:

> "It is dubious . . . that the public interest in deterring *unnecessary delays* in bringing cases to trial would be seriously disserved by excusing in this instance delay attributable to negligence of this sort. Some sacrifice of this deterrent interest is validated, moreover, by the concomitant vindication of the *public's competing interest in the punishment and deterrence of criminal behavior.*" *United States* v. *Roemer*, 514 F.2d 1377, 1381 (2d Cir. 1975) (emphasis added).

Recently, however, this Court, in *United States* v. *Didier*, 542 F.2d 1182 (2d Cir. 1976), ordered an indictment dismissed because the defendant had not been retried within 90 days. The appellant relies heavily on that decision to support his own arguments. In reality the cases bear such little resemblance to one another factually, that any comparison can hardly go beyond the point that both cases involved delayed retrials. In *Didier* the period between mistrial and retrial was 28 months; here the retrial commenced only 17 days after the actual

expiration of the time limitation. In *Didier* the Court found the government "tardy" in filing its notice of readiness (although nevertheless within the allowed time period) *Id.* at 1185, 1187, whereas here the government filed its notice of readiness two days after the declaration of the mistrial. The Court found, in *Didier*, that the government had "acted with inexcusable sluggishness", *Id.* at 1187, and that the government had "sought much of the delay for tactical purposes". *Id.*, at 1189. No such conduct or motivation is present in this case. In *Amendola*, Judge Zampano, prior to the retrial of the appellant, was actively engaged in the initial trials of criminal defendants. While we realize that the Court in *Didier* found that the court's crowded calendar was not sufficient reason for delay, that circumstance, we believe, should be given some consideration in Districts where the ability to reassign cases for prompter action is much less than that of the Southern District of New York.[5] It should also be emphasized that the indictment in *Didier* was not ordered dismissed because the Plan *required* it, but rather the decision was based on the excessive length of the delay, the government's motivation, and the lack of *any* acceptable reasons for the delay.[6]

We respectfully suggest that it is precisely the kind of situation which is present here—competing interests, minimal delay, lack of prejudice, and good faith on the part of the government—that caused the drafters of the Speedy Trial Act and the Connecticut Plan to exclude

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[5] The Federal Reporter, 2d, Vol. 540, indicates, at page ix, that four judges sit in the District of Connecticut, while twenty-six judges sit in the Southern District of New York.

[6] We believe that the Court should also take notice of the fact that, in this case, Judge Zampano believed, at the time, that the 90 day retrial rule still controlled (the case went to trial within 90 days of mistrial). (App. A-26).

mandatory sanctions for situations other than those specified, *see*, n. 4, *supra*. The trial judge had the discretion, under Rule 48(b), F.R.Cr.P., to deny the motion to dismiss the indictment, and the circumstances of this case, particularly the length of the delay, are "hardly enough to invoke . . . adverse review under *Barker* v. *Wingo*, 407 U.S. 514 (1972)". *United States* v. *Housand*, Docket No. 76-1156, Slip Op. 185, pg. 2012 (2d Cir. February 25, 1977).

The appellant also raises two issues which are related, but subsidiary to the main issue discussed above. He claims that although he consented to being retried, thereby waiving any claim of double jeopardy, *see United States* v. *Beckerman*, 516 F.2d 905, 908-909 (2d Cir. 1975); *Gori* v. *United States*, 367 U.S. 364 (1961), his consent bound him for only the 60 day retrial period, and, thereafter, he was free to withdraw his consent. This rationale, while inventive, is clearly erroneous. Neither the Fifth Amendment, the Speedy Trial Act, the District Plan, nor any decision grants such a right as appellant claims. As pointed out above, Section 3161(e) and the Plan require no mandatory sanctions. Rule 48(b), however, gives the Court discretionary power in this area. To adopt the appellant's view would remove this discretion, binding the Court to a sole course of action, and would mean the cases such as *Roemer*, *supra*, and *Drummond*, *supra*, were wrongly decided. Such a result would be ludicrous and contrary to established law and precedent. The appellant may attempt to claim, as he does, a denial of his right to a speedy trial, but, having freely given his consent, he cannot claim he was twice placed in jeopardy.

The appellant also claims that the testimony of the government's gambling expert, Special Agent William Holmes, should not have been allowed because it was

developed following the expiration of the 60 day limitation. The issue is actually of little importance since if this Court orders dismissal, because the speedy trial right has been violated, the issue of Holmes' testimony would obviously become moot. On the other hand, if the Court finds, as we have argued, that dismissal is not warranted, we would assume the Court would also agree that the government has a right to conduct, and try to bolster its own case, in any legitimate manner, up to the point when both parties rest. We wish to take an opportunity, however, to rebut certain inaccurate statements and conclusions advanced by the appellant.

First, the appellant claims that Agent Holmes was able to tie certain gambling conversations involving the appellant with gambling records found in the home of a co-defendant, Daniel Valeriano, while the government expert at the first trial, Agent Cross, was unable to make any connection. He insinuates that the government, therefore, somehow engineered the delay, á la *Didier*, in order to produce Holmes. There is no evidence, in or out of the record, which supports this theory. Just as Agent Cross appeared at the first trial in lieu of Agent Philip Harker, who had done the original examination and analysis but was unavailable for trial, *see*, Appendix, p. 31, Agent Holmes replaced Agent Cross, who was testifying in Philadelphia. In point of fact, Agent Cross *had* connected Amendola's taped conversations to the records found at Valeriano's residence. Appendix, pp. 29-30.

Appellant makes a similar claim concerning the voice identification testimony of Captain Vincent Raucci. The record clearly indicates, however, that Captain Raucci had begun assisting the government as early as September 22, 1976, within the 60 day period (Tr., 350, 352). At no point, contrary to appellant's assertion, did Captain

Raucci "admit" that his testimony was developed subsequent to October 4, 1976.

In sum, the United States respectfully suggests that, since the statute and Plan are silent as to any mandatory sanction, there exists no automatic right of dismissal in the event that the time limitation is not complied with. Since the Court is vested with discretionary powers in determining whether sanctions are appropriate, the resolution of the issue must of necessity revolve around such factors as the excessiveness of the delay, prejudice, and whether the prosecution deliberately sought delay to gain an advantage. We submit that none of the factors which caused this Court to find the situation in *United States* v. *Didier*, *supra*, to be an egregious denial of a defendant's speedy trial right are present in this case. No reasonable purpose envisioned by any of the statutes or plans discussed herein would be served by the dismissal of a case in which the delay amounted to only 17 days. We therefore respectfully request that the District Court's denial of the Motion to Dismiss the Indictment ought to be upheld.

II.

The government may employ a pen register device where a court has found probable cause and issued an order authorizing the interception of wire communications.

The appellant makes brief reference, in his Argument V, to the government utilizing a pen register device, in conjunction with the January, 1973 wire interceptions, without first obtaining a separate court order. Since the issue does not seem to be of great importance to the appellant, the United States simply wishes to point out

that this issue was previously raised before this Court by a co-defendant, in *United States* v. *Daniel Valeriano*, Docket No. 76-1417, *affirmed* January 7, 1977, with the Court, in its opinion from the bench, adopting the positions of the District Court and the Third Circuit in *United States* v. *Falcone*, 505 F.2d 478, 482-483, *cert. denied*, 420 U.S. 955 (1975), that the issuance of a valid wiretap order comprehends, within its terms, the use of a pen register device.

III.

Suppression is not warranted where an individual has not been provided with notice of wire interceptions where he was unidentified at the time and is unable to demonstrate prejudice, nor where there is no notice given of a pen register utilization since that act is ministerial in nature.

In *United States* v. *Donovan*, — U.S. —, 45 LW 4115, (January 18, 1977), the Supreme Court found that failure to comply fully with Title III's inventory provision [18 U.S.C. § 2518(8(d)] does not render "unlawful an intercept order that in all other respects satisfies the statutory requirements". *Id.* at 4121. In that case the government's failure to alert the Court to the identities of two intercepted parties was not intentional and the parties, by ultimately being provided with all relevant documents, suffered no prejudice. *Id.*, at 4122 n.26. The government concedes that, in this case, the appellant, as well as three co-defendants, was not provided with notice of the interceptions. However, in denying the pre-trial motion to suppress, Judge Zampano found that:

> "No evidence has been presented to indicate that defendants Kinsler, Bell, Amendola, and Adams were known to the government, within the mean-

ing of Title III of the Act, so as to require disclosure of their names at the time of the wiretap orders were issued and extended by judges of this District during the first six months of 1973. In fact, as late as February 27, 1974, Agent Connolly informed the grand jury investigating this case that the government was awaiting the results of voice exemplars to establish the identities of certain persons suspected of being overheard, and specifically included these defendants within that category. Subsequently, Agent Connolly reported to the grand jury that the voice tests had been concluded and identifications made. Thereupon an indictment was returned on May 3, 1974. Under these circumstances, since probable cause concerning these defendants may properly be found to be lacking until the spring of 1974, the government was not derelict in failing to reveal their names to the judges who issued and extended the wiretap orders and who established dates for the service of notice inventories." Appendix, p. 43 (citations omitted).

Judge Zampano then went on to state that:

"[I]t does not appear that a post-interception inventory is a central or functional safeguard under Title III which, if tardily furnished, mandates suppression. One of the main purposes of the inventory procedure is to provide notice to those who have had their communications intercepted and to afford any aggrieved person the opportunity to pursue an appropriate remedy. Therefore, in the absence of a showing of prejudice, a failure to serve a timely notice does not require suppression. *United States* v. *Rizzo*, 492 F.2d 443, 447 (2d Cir.), *cert. denied*, 417 U.S. 944 (1974); *United*

States v. *Wolk*, 466 F.2d 1143 (8th Cir. 1972); *United States* v. *Forlano*, 358 F. Supp. 56, 59 (S.D.N.Y. 1973). No prejudice has been demonstrated in the instant case. All relevant information, including a complete transcript of the intercepted conversations, has been made available to the defendants for the purposes of pre-trial motions and defenses at trial. Cf. *United States* v. *Cirillo*, 499 F.2d 872, 882-883 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974). Moreover, there has been no showing that the government deliberately ignored the notice requirements of the statute or that it failed to file inventories in order to gain a tactical advantage. Compare *United States* v. *Eastman*, 465 F.2d 1057 (3 Cir. 1972). To suppress the wiretap evidence under these circumstances 'would be to unnecessarily undermine and subvert the legislation'. *United States* v. *LaGorga*, *supra*, 336 F. Supp. at 194. *See also*, *United States* v. *Doolittle*, 518 F.2d 500, *aff'g*, 507 F.2d 1368, 1371-1372 (5 Cir. 1975)." Appendix, pg. 44-45.

The appellant, notwithstanding the findings of Judge Zampano, pursues in this forum his claim that the wire interceptions must be suppressed because he did not receive notice of the January wiretap.[7] In attempting to distinguish *Donovan*, *supra*, from this case, he claims there is "absolutely no evidence as to any reason why the government did not serve . . . inventory notice . . . nor did it explain its failure to inform the issuing judge of

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[7] It should be noted that a co-defendant raised this same claim before this Court in *United States* v. *Kinsler*, Docket No. 76-1441 (January 7, 1977). At that time the Court affirmed the conviction from the bench citing *United States* v. *Principie*, 531 F.2d 1132 (2d Cir. 1976) and *United States* v. *Rizzo*, *supra*.

the identity of others whose conversations were overheard". Appellant's Brief, pp. 28-29; *see also*, pp. 30-31, 32. He also rather baldly asserts, on page 31, without offering any supporting evidence, that "the government knew in January of 1973 that Amendola was a 'principal target' ". These flat assertions are in sharp contrast to Judge Zampano's *findings* that Amendola, who was not named in the wiretap order, was not "known" to the government, within the meaning of the statute until the spring of 1974. Nor does the appellant attempt to deal in any way with the Judge's finding that no prejudice had been demonstrated.

Instead, the appellant now shifts the point of his attack somewhat to incorporate a claim that suppression of the wiretap is mandated because he received no notice of the January, 1973 and May, 1973 utilization of a pen register device.[8]

As to the January pen register use, reason would seem to dictate that if failure to serve inventory for a wiretap, under the *Donovan*, *supra*, rationale, which we claim to be applicable here, does not warrant suppression, it would hardly be mandated for failure to notify of the use of a pen register utilized *in conjunction with the wiretap.*

Admittedly, however, the situation is muddied by the fact that this Court has recently held, in *Application of United States In Matter Of Order, Etc.*, 538 F.2d 956 (2d Cir. 1976), that the use of a pen register is not covered by the provisions of Title III. The Court inti-

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[8] For descriptions of the mechanics of a pen register *see, United States* v. *Falcone*, 505 F.2d 478, 482-483 (3d Cir.), *cert. denied*, 420 U.S. 955 (1975) and *Application of United States In Matter Of Order, Etc.*, 538 F.2d 956, 957 (2d Cir. 1976).

mated that the use of a pen register device would fall within the sphere of Rule 41 of the Federal Rules of Criminal Procedure. That rule requires that a copy of the warrant be left with the person whose property was seized, that inventory be filed promptly, and that the magistrate, upon request of the party, deliver to him a copy of the inventory (which of course implies that the party knew of the search and seizure). Rule 41(d), F.R.C.P. This, of course, presents no conceptual problems in conventional searches since, in a gambling investigation for example, the search and seizure would normally occur at the culmination of the investigation when there is no longer a need to be concerned with prematurely alerting the suspects. A pen register, on the other hand, would normally be utilized at the inception, or during the course of an investigation, when alerting the suspects must naturally be avoided. We presume that this notice problem could be cured, as in the case of Title III, by the authorizing judge or magistrate allowing the postponement of notice until the investigation had run its normal course. Since use of a pen register can, at best, be considered a hybrid Rule 41 search and seizure, this would seem to provide the best balancing between investigative needs and the statutory rights of a suspect (assuming of course, that the constitutional requirements of probable cause and particularity have been satisfied).

In any event, if pen registers fall under Rule 41, then the failure to provide notice, in situations where the government did not act deliberately to gain an undue advantage and no prejudice is shown, should be considered ministerial in nature and should not invalidate an otherwise lawful search. *See, e.g. United States* v. *Gross*, 137 F. Supp. 244, 248 (S.D.N.Y. 1956); *United States* v. *Klapholz*, 17 F.R.D. 18, 24 (S.D.N.Y. 1955), *aff'd*, 230 F.2d 494 (2d Cir.), *cert. denied*, 351 U.S. 924

(1956); *United States* v. *Averell*, 296 F. Supp. 1004 (E.D.N.Y. 1969); *United States* v. *McKenzie*, 446 F.2d 949, 954 (6th Cir. 1971); *United States* v. *Hall*, 505 F.2d 961, 964 (3d Cir. 1974).

In this case the January pen register was based upon a showing of probable cause, and, as argued previously, authorized by a valid, unchallenged wiretap order. The May pen register was likewise based upon a showing of probable cause, Appendix, pgs. 8-15, and an Order of Authorization from the Honorable Thomas F. Murphy, United States District Judge, District of Connecticut, Appendix, p. 6-7. Contrary to the appellant's assertion, at page 30 of his Brief, Frank Amendola was not named in the order. Rather, the order was directed against the telephone listed to Mrs. Marie Amendola. Also contrary to an assertion by the appellant is the fact that a report was made to Judge Murphy on June 6, 1973 advising him of the results of the pen register utilization. Appendix, p. 16-17. Judge Murphy, having been provided with the results, *did not* instruct the government to notify the affected subscribers. Also, while the appellant claims that he first became aware of the January pen register during the course of his trial, he was unquestionably aware of the May pen register shortly after indictment and this fact alone should have put him on notice of the possibility of previous pen register use. Moreover, Agent Connolly's affidavit makes reference to calls made to the Amendola residence. The agents logs from January, 1973 were also made available to the appellant. *See*, Appellant's Appendix, p. 12. When counsel for the appellant argued lack of knowledge at the first trial, Judge Zampano stated:

> "This has been practically an open file case and I cannot and will not accept that explanation. The logs, the tapes, and various other materials were

> available to counsel, and it is up to counsel for the defendants to prepare its case—their case thoroughly and not to rely on what might have been assumed." Appendix, p. 50.

These facts are cited in order to stress that at no time has it ever been found, or even the slightest evidence produced, that the government deliberatly withheld information from the Court or the appellant in order to gain some advantage to which it was otherwise not entitled, and, of equal importance, the appellant has never made any showing of prejudice. The government's position, on the other hand, is the same as that of the Third Circuit when that Court, in dealing with a Title III inventory issue, stated:

> "We find it difficult to accept the proposition that a search may be deemed reasonable, and therefore constitutional during the various stages of application, authorization, execution supervision of the interception, and termination, only to be invalidated *ab initio* because of the failure of some condition subsequent, to wit, a failure to give notice of the items seized." *United States* v. *Cafero*, 473 F.2d 489, 499 (3d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974).

We therefore respectfully suggest, under all the circumstances here before the Court, that the denial of suppression in the District Court ought to be affirmed.

IV.

The comparison of a voice exemplar to intercepted wire communications provides a sufficient basis for identification testimony by a federal agent.

The appellant challenges the decision of the District Court allowing Special Agent Connolly to give his opinion as to the identity of speakers in intercepted wire communications. While he makes some attempt to distinguish prior cases dealing with this topic, it can hardly be seriously disputed that this Court has previously come down four square against the position argued by appellant. In *United States* v. *Rizzo*, 492 F.2d 443 (2d Cir.), *cert. denied*, 417 U.S. 944 (1974), this Court stated quite clearly that:

> "The standard for the admissibility of an opinion as to the identity of a speaker is merely that the identifier has heard the voice of the alleged speaker at any time." *Id.*, at 448.

The following year the issue again came before this Court, in *United States* v. *Chiarizio*, 525 F.2d 289 (2d Cir. 1975), and the Court stated that:

> "[P]articular expert qualification is not required for voice identification . . . Moreover, it is undisputed that the agent in question had heard Chiarizio's voice exemplar. This undoubtedly provided a sufficient basis for the agent's identification testimony." *Id.*, at 296 (citations omitted).

Moreover, the Rules of Evidence specifically approve of this type of identification testimony. *See*, Federal Rules of Evidence, Rules 806(a) and 806(b)(5). Here Agent Connolly had not only compared Amendola's voice exemplar

to the intercepted conversations on several occasions (Tr. 219, 221, 257, 304), but he had also spoken personally with Amendola between eight and ten times (Tr. 229). Indeed, Judge Zampano found the record in this case to be much stronger on this point than the record in *Chiarizio* (Tr. 241).

The United States therefore suggests that the appellant's position is in complete contrast to that previously enunciated by this Court, and the decision of the trial Court to allow Agent Connolly's testimony ought to be upheld.

V.

The playing at trial of an exemplar of the defendant's voice, a physical characteristic, was not violative of any right protected by the Fifth Amendment.

The appellant contends that the playing of his voice exemplar at trial violated his Fifth Amendment right against self-incrimination. He is apparently unaware of *United States* v. *Dionisio*, 410 U.S. 1 (1973), in which the Supreme Court held that the compelled display of an identifiable physical characteristic, specifically a person's voice, infringes no interest protected by the Fifth Amendment. *Id.*, at 5-6. *Dionisio's* rationale applies with equal force to the compelled production of a voice exemplar to a grand jury and the playing of that exemplar at trial. *See, e.g., United States* v. *Jones*, 443 F.2d 1077 (4th Cir. 1971) (defendant compelled to repeat words spoken by robber so that witness could make voice identification); *United States* v. *King*, 433 F.2d 937, 938 (9th Cir. 1970), *cert. denied*, 402 U.S. 976 (1971) (defendant required to don, at trial, certain distinctive clothing used in a rob-

bery); *Mikus* v. *United States*, 433 F.2d 719, 726 (2d Cir. 1970) (defendant required to stand for purposes of identification and comparison). The appellants voice exemplar was a properly authenticated item of evidence (Tr. 167-169), and the jury, as the ultimate finder of fact, had the right to determine for themselves whether the voice on the exemplar given by Frank Amendola and the voice alleged to be Frank Amendola on the wire interceptions were indeed one in the same.

Appellant's claim is frivolous and, we respectfully suggest, ought to be denied.

VI.

The testimony given by a representative of the Southern New England Telephone Company was not proscribed by 47 U.C.C. § 605, and, in the alternative, the issuance of a subpoena satisfied the intent of the statute.

The appellant claims that Judge Zampano erred in refusing to strike the testimony of James O'Connor, a security agent of the Southern New England Telephone Company. The argument advanced is that by testifying about telephone company documents without a subpoena, Mr. O'Connor, and thereby the government, has violated Section 605 of Title 47, United States Code. We assume, although it is not stated, that the relief sought is a new trial. The claim, however, is frivolous and has no basis in law or fact.

Section 605 of Title 47 reads, in pertinent part, as follows:

> "Except as authorized by Chapter 119, Title 18, no person receiving, assisting in receiving, transmit-

> ting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response of a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority."

It should first be noted that Mr. O'Connor simply testified concerning certain toll records for the purpose of identifying the subscriber to particular telephones (Tr. 7-10, 12-14), and certain documents which concerned the disclosure to the F.B.I. of technical information concerning the telephones involved in the January wiretaps and May pen register utilization (Tr. 16-28). The latter information was given to the F.B.I. at the direction of Court Orders (Tr. 26, 29), and all the records and documents had been kept in the normal course of business of the telephone company (Tr. 15, 21, 22, 26). This Court has ruled in the past that toll call records do not fall within the prohibitory scheme of Section 605. *United States* v. *Covello*, 410 F.2d 536, 542 (2d Cir.), *cert. denied*, 396 U.S. 879 (1969), *rehearing denied*, 397 U.S. 929 (1970). The Court stated:

> "Section 605 was not designed to render evidentially inadmissible the records made in the ordinary course of the telephone company's business and which are essential to the ordinary operation of

> that business." *Id; see also, United States* v. *Barnard*, 490 F.2d 907, 913 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); *United States* v. *Cerone*, 452 F.2d 274, 289 (7th Cir. 1971); *United States* v. *Kohne*, 347 F. Supp. 1178, 1183 (W.D. Pa. 1972).

We, of course, would also argue that technical information concerning the location of appearances and binding posts, such as was found in government exhibits (5, 6, 7) which are objected to is also "essential to the ordinary operation" of phone company business and would therefore be included in the *Covello, supra*, rationale. Other courts, in construing the statute, have found that the first clause of Section 605 does not apply to administrative and accounting personnel of a phone company. *United States* v. *Baxter*, 492 F.2d 150, 166 (9th Cir. 1973), *cert. denied* 416 U.S. 940 (1974); *United States* v. *Russo*, 250 F. Supp. 55, 58-59 (E.D. Pa. 1966); *United States* v. *King*, 335 F. Supp. 523, 534 (S.D. Calif. 1971), *aff'd in part, reversed in part on other grounds*, 478 F.2d 494 (9th Cir.), *cert. denied*, 414 U.S. 846 (1973). John O'Connor, a security agent, would, under the facts presented here, surely fall into the category of administrative personnel. Moreover, none of the exhibits specifically complained of, and none of O'Connor's testimony concerning them, touches, in any way, upon the criteria set forth in the first clause of the statute.

The main point that we wish to make, however, is that even assuming *arguendo* that the documents and testimony were covered by the statute, the disclosure by Mr. O'Connor would be authorized by Section 605. Keeping in mind that the same information and documents had been produced, under subpoena, by one of Mr. O'Connor's assistants at appellant's first trial, Appendix, pp. 51-60, Mr. O'Connor testified that prior to trial he

was asked to appear by the government attorney handling the case (Tr. 33-34). The appellant does not challenge the representations made to the trial Court that a subpoena had been issued beforehand, but that the government attorney had simply forgotten to bring it with him (Tr. 33), and that it had been served on Mr. O'Connor the day following his testimony (Tr. 499). The prior issuance of the subpoena would clearly fall into the fifth exception of clause one (subpoena issued by a court of competent jurisdiction), *see*, *Nolan* v. *United States*, 423 F.2d 1031, 1045 (10th Cir. 1969), and we believe that the request by the federal prosecutor alone would fall into the "demand of other lawful authority" exception. *Cf*, *United States* v. *King*, *Id.* at 534 (disclosure at request of Customs agent).

In sum, the following factors stand out:

1. Mr. O'Connor was not a member of the class of persons affected by the statute;

2. Toll call records are not covered by the statute;

3. The three exhibits complained of, and the testimony concerning them, did not relate to any of the criteria set forth in the statute; and

4. A subpoena calling for the production of the documents and Mr. O'Connor's appearance had issued prior to his testimony.

For these reasons the United States respectfully requests that appellant's claim ought to be denied.

VII.

The District Court followed the approved rule of this Circuit in correctly instructing the jury on the issue of missing witnesses.

The appellant, in his summation, argued to the jury that an inference, adverse to the government, should be drawn because several F.B.I. agents had not been called as witnesses to identify the voice of Frank Amendola (Tr. 540-541). He objects that Judge Zampano then instructed the jury, in essence, that the failure to call a witness available to both parties permits the jury to properly draw an inference unfavorable to either party, or to draw no inference at all.

In support of his argument, the appellant cites *United States Ex Rel. Cannon* v. *Smith*, 527 F.2d 702 (2d Cir. 1975) in which a court, in the course of a suppression hearing, drew an unfavorable inference from the failure of the government to call two witnesses on the issue of an unduly suggestive lineup (the individuals had been present at the lineup). *Id*, at 705. Here, however, the issue was Agent Connolly's voice comparison, and there was no evidence that the monitoring agents named by appellant's counsel had ever made, or even been able to make, voice comparisons to identify Amendola. Clearly it would be unfair, under these circumstances, to instruct the jury to draw an unfavorable inference from their absence especially when they were equally available to the appellant. Of course, the focal point on this issue is that the substance of Judge Zampano's charge has been previously approved by this Court and has been the rule of this Circuit for many years. *United States* v. *Ploof*, 464 F.2d 116, 119 (2d Cir.), *cert. denied*, 409 U.S. 952 (1972); *United States* v. *Crisona*,

416 F.2d 107, 118 (2d Cir. 1969), *cert. denied*, 397 U.S. 961 (1970); *United States* v. *Evanchik*, 413 F.2d 950, 953-954 (2d Cir. 1969). The United States, therefore, respectfully urges this Court to adhere to its prior decisions and uphold the charge as given by the District Court.

VIII.

The tolling of the statute of limitations on a state gambling misdemeanor has no effect on a federal prosecution for violation of 18 U.S.C. § 1955.

The appellant contends that the indictment must be dismissed because he was indicted on federal charges subsequent to the tolling of the state gambling statute. This argument has several serious flaws.

In the first place, appellant contends that the federal charges involved the time period of January 17 to January 27, 1973, and therefore the state statute of limitations had run by the time he was indicted in May, 1974. In point of fact, his indictment charges a continuing offense from January 1, 1973 to July 16, 1973, *and* a conspiracy covering the same time period. Moreover, the appellant does not challenge the fact that the government offered unrebutted evidence of his participation in the gambling business in July of 1973. The state statute, quite simply, had not run at the time appellant was indicted.

The appellant also errs in assuming that the "sovereign" in this case is the State of Connecticut. It should, however, be obvious to him, by this point, having been indicted under federal statutes, by a federal grand jury, and tried in a District Court, that the sovereign is the United States of America. The illegality of his acts under state law is merely the jurisdictional predicate

under which federal power is invoked. *Cf.*, *United States* v. *Smaldone*, 485 F.2d 1333, 1343 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). In analogous situations, the Courts in *Smaldone*, *Id.* and *United States* v. *Chiarizio*, 388 F. Supp. 858, 863 (D. Conn.), *aff'd*, 525 F.2d 289 (2d Cir. 1975), held that the repeal of the jurisdictional state gambling statutes did not nullify federal gambling prosecutions. Finally, in a case precisely on point, which is blithely dismissed by the appellant, the Fifth Circuit stated, quite clearly, that since the gravamen of the indictment was the violation of federal law, the state statute of limitations was *not* to be incorporated into the federal statute. *United States* v. *Revel*, 493 F.2d 1, 2-3 (5th Cir.), *rehearing denied*, 495 F.2d 1372 (5th Cir. 1974), *cert. denied*, 421 U.S. 909 (1975).

For these reasons, the District Court's denial of the Motion to Dismiss the Indictment should be upheld.

CONCLUSION

Based on the above-stated reasoning and authorities, the United States suggests that the issues raised by the appellant are either factually insufficient or contrary to established law, statutory and decisional, and we therefore respectfully urge that the rulings of the district court be upheld and the conviction affirmed.

Respectfully submitted,

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-1491

U S A,
APPELLEE,

v.

FRANK AMENDOLA,
APPELLANT.

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street, New York, New York 10023

That on the 22nd day of March, 1977, deponent served the within Brief upon Roger J. Frechette, Esq., 215 Church Street, New Haven, CT 06508

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D. O'Hara

Sworn to before me,

This 22nd day of March, 1977

Shirley Amaker

SHIRLEY AMAKER
Notary Public, State of New York
No. 24-01AM4508768
Commission Expires March 30, 1979